in a manner calculated to minimize the possible ill effects of its application. It should be observed that in no case does the judicial mind dispute the validity of the inference arising from the resemblance of features or other corporal characteristics to those of the alleged paternity. The contention rests on the difficulty of establishing the fact upon which to rest the inference, namely, such resemblance. The danger attending the acceptance of a fanciful resemblance should be practically obviated by allowing the court to exercise its discretion with regard to the degree of maturity necessary in the instant case to justify comparison, and a further safeguard is found in the requirement that all inference shall be based on the observation and detailed statements of specific traits as contrasted with mere general descriptive terms.[9]

In conclusion, it may be said that the English courts have apparently admitted this evidence from earliest times without qualification,[10] and the early practice in our courts was probably the same; but, as the chief use of the evidence was in filiation proceedings to charge the defendant with the paternity of a bastard, the possible abuse of the system gave rise to the wide diversity of opinion that exists today in the United States.

TITLE BY ADVERSE POSSESSION AS AGAINST MUNICIPAL CORPORATIONS.—The maxim *nullum tempus occurrit regi* or, as phrased in this country, *nullum tempus occurrit reipublicae,* is so firmly established in the system of English and American jurisprudence, and its application with reference to the state itself is so clearly defined, as a general proposition, that no mention of it from that standpoint need be made for the purpose of this discussion.[1]

The authorities are at variance, however, as to the application of the maxim to municipal corporations. In the recent case of *Robinson* v. *Lemp* (Idaho), 161 Pac. 1024, the court differentiated property owned by a municipality in its public capacity, for public uses, from property held in its proprietary capacity, for other than public uses. The decision seems to be eminently sound on principle, though many cases fail to make the distinction. A municipal corporation is, of course, a creature of the state, and the purpose of creating it is to afford a convenient instrumentality for governmental administration in thickly settled communities. Such a corporation has, however, a dual status or character,[2] and it may exercise many functions other than those which benefit the public in general, and which operate merely to confer a local benefit. Therefore, municipalities are said to act either in a public or gov-

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[9] 1 WIGMORE, EV., p. 221.

[10] Piercys Case, 12 How. St. Tr. 1199; HUBBACK, SUCCESSION, 384.

[1] United States *v.* Thompson, 98 U. S. 486; Levasser *v.* Washburn, 11 Gratt. (Va.) 572.

[2] Simplot *v.* Chicago, M. & St. P. Ry. Co., 16 Fed. 350, 359.

ernmental capacity, or in a private or proprietary capacity.[3] In the former case it is merely an arm or agent of the state for the administration of governmental functions, and most of the activities of a municipal corporation are conducted in this capacity. The administration of justice, the preservation of public health and morals, the maintenance of peace and order, among others, are essentially governmental functions. When acting in the latter capacity, however, it does not do so as an agent of the state; it does not perform a governmental function, but is merely engaged in a pursuit which operates to confer some local benefit or convenience upon the inhabitants of the corporation, as distinguished from the general public.

The decisions, with practical unanimity, hold that title by adverse possession may be acquired as against a municipal corporation of property owned by it in its proprietary capacity.[4] Thus, in *Kearney* v. *Borough of Westchester*,[5] it was held that in supplying its inhabitants with water the corporation acted in a proprietary capacity, and that the right to take water from a pipe of the system could, therefore, be acquired by adverse user. Here the corporation does not act as an agent of the state, and is in no respect executing a public trust. It acts as would a private corporation or a natural person, the general public having no rights or interests in the premises, and time runs against it as in the case of private corporations or natural persons.

With respect to property owned by a municipal corporation in its governmental capacity, the authorities are very unsatisfactory and irreconcilable. There are two lines of authorities at this point, and they are diametrically opposed to each other. The decided weight of authority supports the decision in *Robinson* v. *Lemp, supra*. These authorities make the distinction between property owned by the municipality in its public capacity and that owned in its private capacity, and hold that title by adverse possession of property owned in the former case, in trust for the benefit of the general public, cannot be acquired as against the corporation.[6] This view is undoubtedly sound on reason and principle. A municipal corporation, when performing governmental functions, is acting as an agent of the state, and should be clothed with the privileges accorded sovereignty. The maxim *nullum tempus occurrit reipublicae* should be applied, and the municipal corporation afforded the same immunity from losses resulting from the laches of its officers as is enjoyed by the state itself. Under this line of decisions the question resolves itself into a mere determination of the character of the holding. Cases may arise in which difficulty is

[3] *Supra*, note 2.
[4] Kearney *v.* Borough of Westchester, 199 Pa. St. 392, 49 Atl. 227; San Francisco *v.* Straut, 84 Cal. 124, 24 Pac. 814; Palmer *v.* Jones, 188 Mo. 163, 85 S. W. 1113.
[5] *Supra*.
[6] Kopi *v.* Utter, 101 Pa. St. 27; Jersey City *v.* Morris Canal & Banking Co., 12 N. J. Eq. 547, 560.

experienced in determining this. However, this line of cases establishes definitely that streets, and other like public places, are held in a governmental capacity as an inalienable trust for the benefit of the public.[7]

The other line of cases makes no distinction between property owned in a governmental capacity and that held in a proprietary capacity. On the other hand, they hold distinctly that a municipal corporation is not within the scope of the maxim, and that time runs against it with respect to all property, regardless of the capacity in which it is held, in the same manner and to the same extent as it does against a private corporation or a natural person.[8] The view expressed in some of the cases in this category, to justify their holding, is that a municipal corporation is not created and powers are not conferred upon it primarily for the benefit of the public at large, but the benefit to, and the interest of, the public is merely incidental; that the corporation does not act as an agent of the state, and, therefore, the maxim does not apply.[9] These cases are in the minority, and do not seem justifiable on reason and principle.

RIGHTS OF STOCKHOLDER UPON RESCISSION OF CORPORATE DIVIDEND.—A cash dividend entitles the shareholder to a certain sum of money, and is the ordinary way in which he reaps from time to time the fruits of his investment. It divides among the shareholders the accumulated earnings of the corporation, and the latter at once parts with all interest therein.[1] Dividends must issue from funds derived from the business and earnings of the corporation, and cannot issue from the capital stock.[2] The directors of the corporation have large discretion in deciding when and to what extent the surplus shall be distributed, and a court of equity will not interfere, even though large amounts have accumulated, as long as the directors act in good faith and as it seems to them for the best interest of the corporation.[3] This is entirely right; for the management of the corporate affairs has been delegated to the directors by the voluntary act of the majority of the stockholders. They should decide how much is necessary to be retained for the most successful prosecution of the business, and their well laid plans should not be upset by the court every time a dissatisfied shareholder finds a surplus on hand. But where bad faith is shown

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[7] *Supra*, note 6.

[8] Town of El Dorado *v.* Ritchie Grocery Co., 84 Ark. 52, 104 S. W. 549; Flynn *v.* City of Detroit, 93 Mich. 590, 53 N. W. 815.

[9] City of Fort Smith *v.* McKibbin, 41 Ark. 45, 48 Am. Rep. 19.

[1] DeKoven *v.* Alsop, 205 Ill. 309, 68 N. E. 930, 63 L. R. A, 587.

[2] DeKoven *v.* Alsop, *supra;* Hyatt *v.* Allen, 56 N. Y. 553, 15 Am. Rep. 449; Wood *v.* Dummer, 3 Mason 308, Fed. Cas. 17,944.

[3] Hunter *v.* Roberts, Thorp & Co., 83 Mich. 63, 47 N. W. 131; Stevens *v.* United States Steel Corp., 68 N. J. E. 373, 59 Atl. 905; Wolf *v.* Underwood, 96 Ala. 329, 11 South. 344.